

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
NATIONAL BITUMINOUS COAL WAGE AGREEMENT

In the matter between)	
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)	
CONSOLIDATED COAL COMPANY)	Case No. 02-22-06-004
EMERY MINE)	
)	DECISION AND AWARD
)	(Second
CorrectedVersion))	
UNITED MINE WORKERS OF AMERICA)) October 2, 2006
DISTRICT 22,LOCAL UNION 1261)	
)	
)	

_____)

APPEARANCES:

On behalf of the Employee Organization	On behalf of the Employer
David Maggio	W. Kent Eden
International Representative	Manager Administration
United Mine Workers of America	Consolidated Coal Company
525 100 th South	P.O. Box 527
Price, UT 84501	Emery, UT 84522

BEFORE:

Fred D. Butler
ARBITRATOR

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I.

INTRODUCTION

This arbitration arises pursuant to the agreement between the UNITED MINE WORKERS OF AMERICA, District 22, Local Union 1261 (Hereinafter referred to as the Union) and the CONSOLIDATED COAL COMPANY (hereinafter referred to as MANAGEMENT), under the National Bituminous Coal Agreement, under which Fred D. Butler was selected as Arbitrator and under which this award is final and binding on the parties.

The matter involves Management's decision to post for bid the position of Master Welder/Mechanic.

The Union filed a grievance maintaining that Management's action is a violation of the Wage Agreement of 2002.

On August 7, 2006 in the City of Price, Utah, the following parties appeared before me in an arbitration hearing, pursuant to the above agreement.

Representing Management was W. Kent Eden, Manager Administration. Assisting Mr. Eden was Stephen Behling, Superintendent and Rose Potestio, Human Resources Administrator. Appearing as witnesses for Management was Steve Behling. Russel Jensen, General Maintenance Foreman and James Kulow, Supervisor Safety.

Representing the Union was Dave Maggio, International Representative. Assisting Mr. Maggio and appearing as a witness was Ben Staley, Diesel Mechanic. Appearing as witnesses for the Union were M. James Prettyman, Mechanic and Mark Jensen, Surface Supply Man.

The parties were afforded full opportunity for examination, cross-examination of witnesses and introduction of relevant exhibits.

The parties introduced two (2) joint exhibits at the hearing, namely JE-1, the National Bituminous Coal Wage Agreement of 2002 and JE-2, Grievance 11-05-23-06 Class Action Grievance Form dated 5/31/06

The Union introduced four (4) additional exhibits. Namely U-1, Job Bid 02-06-84 Master Welder/Mech. dated May 18, 2006; U-2, Section 4.1.3.1 Welders and Welding Operators/ Structural Welding Code-Steel; U-3 Welder, Welding operator or Tack Welder Qualification Test Record for Terry Phillips, dated 25 January 1993 and U-4 Emery Mine Employee Seniority list.

Management introduced four (4) additional exhibits, namely M—1, Job bids dated January 26, 2006, March 23, 2006 & May 30, 2006; M—2 Job Bid Awards for Shuttle Car Op, Miner Opr, Roof Bolter Op. Graveyard, Rockduster, Master Welder/Mech., Beltman, Fireboss, Mechanic; M—3 Letter dated July 31, 2006 from Auroa Welding to Whom it May Concern re: Terry Phillips; M—4 Consol Energy Education Refund Plan application for Course Approval for James Prettyman, Braway Killpack, Kirk Perkins & Joe Jorgensen.

The proceedings were tape recorded. The record closed on August 7, 2006 following the presentation of closing argument. The Arbitrator requested a date of on or before September 20, 2006 for the rendering of the award.

II.

STATEMENT OF THE ISSUE

By Agreement of the parties, the Arbitrator framed the issues as follows:

1. Did Management violate Article IV(f) of the National Wage Agreement when it created and posted the Position of Master Welder at the Emery Mine? If so, what is the remedy?

2. Did Management violate the National Wage Agreement by not posting for bid the position of Surface Utility Man? If so what is the proper remedy?

III.

CONTRACT PROVISIONS

The terms of the relevant contract provisions, in pertinent parts, are outlined below.

ARTICLE IA. SCOPE and COVERAGE

Section (d) Management of the Mines

The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

ARTICLE IV WAGES AND HOURS

Section(f) Standard Daily Wage Rate

. . . No Employer shall have authority to introduce any job title or any classification into a mine in which it does not presently exist, except where permitted under any Skills Enhancement Program adopted by the parties pursuant to Article XVI(h)

ARTICLE XVI TRAINING

Section (h) Skills Enhancement Program

The Employer has the option to establish on a mine to mine basis a program to enhance the skill of its employees to reduce, where appropriate, the number of job classifications, job grades, and job titles set forth in Appendices A

and B. Furthermore, Employees could be assigned to work within any job classification or title developed as part of the program.

ARTICLE XVII SENIORITY

Section (a) Definition of Seniority

Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded.

ARTICLE XIX

Section C. Temporary Assignments

Every reasonable effort shall be made to keep an Employee at work on the job duties normally and customarily a part of his regular job, and to minimize to the extent practicable the amount of temporary assignments of particular individuals to other jobs. However, where a senior Employee has expressed a desire to improve his ability to perform a job to which he wishes to be promoted, to the extent practicable, he shall be given a preference in filing temporary assignments in regard to that job.

IV.
STATEMENT OF FACTS

The following is a summary of the findings of facts as determined by the arbitrator based on the testimony and evidence submitted.

On May 18, 2006, Management posted Job Number 02-06-84 for bidding. (JE-2) The position is that of Master Welder-Mechanic. The job required that the successful bidder must be a certified welder and must have diesel certification. The job duties also include general clean-up and equipment washing, cleaning and servicing.

Three employees bid on this position. (Testimony of Stephen Behling) The bid was awarded to Terry Phillips. (M—2, pg.3) Mr. Phillips was not the most senior employee bidding for the position in terms of time working at the mine. The Senior bidder did not meet the job requirements, namely that of being a Certified Master Welder. (Testimony of Stephen Behling) Mr. Phillips is a certified Master Welder having been certified in January 1993 (U-3) and having worked continuously since that time (M—3)

This is first time that the classified position of Master Welder appears at this location. In the past Mechanics at the mine performed welding tasks. On occasion however, Management had a need for higher level expertise in this area. Therefore from time to time Management would hire an outside contractor to perform this higher level work.

The background on the development and the posting of this position began when a surface worker took an extended medical leave. The duties of that position included washing equipment, general clean-up as well as other similar duties.

In considering transferring an employee to this position and in accordance with the Wage Agreement, the position was offered to at least two senior employees who expressed an interest. However these individuals later chose not to continue or withdrew their request (Testimony of Stephen Behling) Thereafter Management appointed Terry Phillips to the Surface man position.

After one year, the individual holding the bid was scheduled to return from Medical Leave. However, Management retained Mr. Phillips in a temporary position. Management in assessing its options determined that the type of work that Mr. Phillips had performed, including his skills as welder made them aware that they needed this additional expertise on the surface.(Testimony of Stephen Behling) Therefore Management decided to keep Mr. Phillips on the surface performing these and other task.

During this same period of time, members of the Union complained that a temporary vacancy of Surface man existed and should be posted for bid. After a Step 2 hearing on a grievance filed in that regard, Management agreed to post the position. (Testimony of Ben Staley)

Because the additional work that had been performed by Mr. Phillips demonstrated to Management a need to increase efficiency and save cost at the mine, Management decided to combine the duties that had been performed by Mr. Phillips and post the position as Master Welder-Mechanic with the additional duties as outlined above. (Testimony of Stephen Behling)

Management has combined job duties such as Bathroom Mechanic in the past. (Testimony of Stephen Behling) However this was done when the mine was closed and there was only two (2) employees working. (Ben Staley)

As stated above, prior to this time, all welding tasks were performed either by employee-mechanics or outside contractors. (Testimony of Stephen Behling) In the past there has not been a requirement that these individuals be certified because the types of jobs in which they were involved were not complex and did not contain safety risk. In addition there is no legal requirement for certified welder.

Management does have a program to assist employees who desire to go to school in order to become eligible for certification. However it is believed that because of the lack of the legal requirement, individuals who have trained and could have received the certification did not choose to do so.(Testimony of Mark Jensen)

The posted Master Welder bid requires that the employee devote between 40-50% of his time to welding. (Testimony of James Prettyman, Russel Jensen) Because of this there is an opportunity to combine this position and task with other needed ones. The employee could for example weld one complete day and do the other activities one full day (Testimony of Stephen Behling, Russel Jensen)

As stated above, there has never been a separate job classification of Master Welder/Mechanic at this mine. Nor have there been a position that combines these duties with those of equipment washer, general clean-up and equipment servicing. (Testimony of Stephen Behling, Ben Staley, James Prettyman)

Because of the nature of the jobs planned, which could involve safety issues the question about liability is a concern. Additionally the opportunity to do these jobs in-house without contracting with certified welders, is an opportunity to save funds and create greater efficiencies (Testimony of Stephen Behling, Russel Jensen)

After discussing the matter with Management, the Union filed a grievance alleging that the "Bid qualification posted are not commensurate with the skills necessary to do the job posted." The grievance also demanded that "a bid post that does not bypass seniority, past practice and all other articles that apply."

The matter was not resolved during this process and it was referred to arbitration.

V. POSITION OF THE PARTIES

Union's Position

It is the Union's position that the position of Master Welder is a newly created position that never existed at the mine before. The Union contends that this is a violation of Article IV (f) of the Wage Agreement which only allows Management to bring in new positions under the Skills Enhancement Program.

It is also the Union's position that to assign an employee the position of Master Welder but require the employee work 50% of their time doing other work would in reality be a daily temporary assignment. This would be a violation of Article XIX, which requires that employees work in their classification and to minimize the amount of temporary assignments.

The Union also maintains that the position was created for one person who was occupying a temporary Surface Man position. Because Management wanted to keep him in that slot without bidding, it created a position for which only he could qualify, knowing that others seniority would be trumped by this. This is in violation of the terms of seniority as outlined in the Wage Agreement.

Therefore the Union request that Management be required to remove the bid of Master Welder Mechanic for the reason outlined and that they be required to bid the position of Surface Utility Man (Equipment Washer)

The Union presented the following Decisions/Awards in support of its position. Namely UMWA & Pinnacle Mining Co, Case No. 02-17-05-192(2005) Richard Brooks, Arbitrator; UMWA & EACC-Pine Ridge Coal, Case No. 98-17-00271 (2000) Andrew M. Strongin, Arbitrator; UMWA & Rocky Hollow Mines, Case No. RS-91-17-92-009 (1993) Michal H. LeRoy, Arbitrator; UMWA & Rend Lake Mine, Case No. 93-12-96-140 (1996) Charles Marino, Arbitrator; UMWA & Arch of Illinois, Case No. 93-12-95-86 (1996) Paul F. Gerhart, Arbitrator; UMWA & Eagle Nest Company, Case No. 88-17-02-1379 (1993) Marvin J. Feldman, Arbitrator.

Management's Position

It is Management's position that the Wage agreement gives them the right to organize and determine the manner in which work functions are to be performed, and if performed by classified employees, what classified jobs exist or are to be created for the performance of the work by classified employees.

They maintain that the classification of Welder has been listed in the Wage Agreement since the 1971 Agreement and employees at the mine have been performing this task. They also contend that the job was an addition to all other jobs at the mine so that no one lost their current bid job and this will allow Management the flexibility to perform specialized welding work with the mine employees rather than hiring an outside contractor to do the work.

Management further maintains that the Union was advised that when the job was posted, it would require that the successful bidder be a certified welder. There was no indication from the Union or any employee of any interest in becoming certified at that time.

It is Management's position that it has the discretion to set minimum standards which define ability, provided such standards are not arbitrary, capricious, unreasonable or discriminatory. In this case they determined the minimum ability to be certified in welding and diesel testing. While it is true that the duties of the job were designed to match the actual work that the awarded bidder had been performing for the past six months, but that is why it was bid.

Maintaining a requirement that an employee in this position be a certified welder as a condition of receiving the Master Welder Bid is not an unreasonable or arbitrary act by Management. It is simply not prudent or safe to allow welding on for example, overhead walkways by employees who have not demonstrated superior welding skills that are measured through certification.

They contend that the only other option would be to employ outside contractors to come to the mine on each and every occasion that these areas are to be welded. Therefore they contend that Management acted in the best interest of the hourly workforce and the Union. Management was able to create an additional job benefitting the entire workforce. The Union only complained when their guy did not get the job.

Finally, there is no advantage to have this job without assigning other duties and because of this Management has assigned other duties to the job to make it a full-time position. It is not uncommon for Management to combine job duties which cross lines. The example is the Bathhouse Mechanic position, which still exists today.

Therefore Management contends that there is no convincing evidence or argument to support the Union's position and request that the Arbitrator deny the grievance.

Management presents the following Decisions/Awards in support of its position. Namely, UMWA & Transport, Inc, Arbitration Review Board Decision 78-26 (1980); UMWA & Pittsburg and Midway Coal Mining, Case Nos. 95-035 & 95-044 (1996) Paul F. Gerhart, Arbitrator; UMWA & Magnet Coal Company, Case NO. 88-17-92-1208 (1992) Norman R. Harlan, Arbitrator; UMA & Wolf Creek Collieres Company, Case No. W.C.-95-17-11 (1995) Michael L. Allen, Arbitrator; UMA & Eastern Assoc Coal Corporation, Decision No. 17, (1975) EA. Lynch, Arbitrator; UMA & Drummond Company, Case No. SC 131-97 (1998) James R. Beilstein, Arbitrator; UMA & Pittsburg & Midway Coal Mining, Case No. 1926-1689 (1989) Thomas J. DiLauro, Arbitrator; UMA & Eighty Four Mining Co, Case NO. 00-84-19 (2000) Thomas L. Hewitt, Arbitrator; UMA & Jim Walter Resources, Inc., Case No. 3-JWR-84-20-85-9 (1985) Marvin J. Feldman, Arbitrator; UMWA & Peabody Coal Company, Case No. 98-12-98-15PCC (1999) George R. Fleischli, Arbitrator; UMA and United States Steel, Arbitration Review Board Decision, Case no. 16 (1975); UMA & Southwestern Illinois Coal Corporation, Arbitration Review Board Decision No. 19 (1975); UMA & Peabody Coal Company, Case NO. 98-12-99-33-PCC (1999) David L. Beckman, Arbitrator.

VI. DISCUSSION

Article IA, Sections (d) states:

The Management of the mines, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

There is a plethora of decisions issued both by the Arbitration Review Boards and Arbitrators interpreting and upholding that right. As ARB Decision 78-26 points out, Management has the inherent right to determine what work is to be done, when it to be done, by whom it is to be done, and what duties are to be assigned to what jobs or personnel.

The ARB Decision and Decisions that have followed also recognized that the Wage Agreement which resulted from collective bargaining is viewed as a code agreed to between the parties to regulate and limit the discretion of the Employer in the operation of it's business as it is exercised in regard to wages, hours, terms and conditions of employment.

The cases reveal that this understanding does not change the rules or practices of the industry pertaining to Management and the Mine workers intend no intrusion upon the rights of Management as heretofore practiced and understood.

However, these precedential decisions all seem to agree that Management rights are not absolute and are subject to express contractual limitations. The Union correctly points out that Article IV(f) is one of these express limitations.

Article IV(f) of the Wage Agreement states in pertinent parts:

. . . No Employer shall have authority to introduce any job title or any classification into a mine in which it does not presently exist, except where permitted under any Skills Enhancement Program adopted by the parties pursuant to Article XVI(h).

ARB Decision 78-16, which determined that equipment that had been used in other mines could be introduced in mines where they had not been used before, the Board cautions that a literal reading of this article could cause an absurd result.

That decision went on to say that the sentence limiting new job titles was to guard against the employer creating new jobs to evade proper wage payment.

The sentence's purpose is to keep Management, already paying a particular wage rate for a certain bundle of duties, from paying a different wage rate for substantially the same bundle of duties by the device of installing an allegedly new job title or classification by resorting, in effect, to subterfuge to change established wages rates. ARB Decision 78-16, pg. 8

That Decision does not say that Article IV(f) does not apply and only analyzes the reasoning for its incorporation in the Wage Agreement. ARB Decision 78-16 states only that as it pertains to this Article, because it appears in the context of wages and hours. Namely that Management has room to act when such concerns are not an issue.

In UMA & Peabody Coal Company, Case No. 98-12-99-33-PCC (1999) a case presented by Management, Arbitrator David Beckman acknowledges in quoting ARB Decision 74-19 that this would also include Seniority issues as well.

After a review of the ARB Decisions, with regard to the creation of a new position at the mine, it is determined that Management is prevented by the contract from unilaterally creating new positions and that the Wage Agreement has been modified over the years to expressly outline how these new positions can be created under that Agreement.

Notwithstanding this, Management maintains that the classification of Welder has been listed in Appendix B since the 1971 Agreement. Therefore, they state that this is not a new position but an enhancement. However a review of Appendix B does not reveal the title of "Master Welder."

Management went to great lengths to distinguish this position from the Welder Classification as well as the work that is presently being done by Mechanics. Management's explanation is that the type of work that would be done under this new classification would not be the same as the Welder Classification but would be mainly on the surface and would involve jobs that would be considered special and that would involve safety considerations. Further Management also placed great emphasis on the fact that there has to be an acceptable level of skill equivalent to the skills exhibited by outside contractors.

Considering Management's discussion distinguishing the position and the fact that they did not present any evidence to show that a similar position exists at the mine that also requires the employee to perform the duties of a Surface Utility Man, further supports the Union's position that this is a new position.

The Union also appears to be questioning Management's right to require Welder Certification for the position even if approved. In that vein, Arbitrators have determined that Management is well within its rights under ARB Decisions to determine the qualifications of positions in the mines as long as its determinations are not discriminatory and absent a proven intent to subvert the contractual classifications and seniority system. (See ARB Decision 78-26)

It does not appear that the certification requirement will do so. However the Welder Certification requirement would "leap frog" the worker with certification ahead of others on the seniority list who did not possess the certification. This would not violate the Wage Agreement as it pertains to seniority.

Article XVII(a) states in pertinent parts:

Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded."

Seniority therefore is not just determined to be years at the mines but is also based on other considerations. As a result, if the Master Welder position is successfully created under the procedures outlined in the wage agreement, and contains this certification requirement, it is again conceivable that those who have experience, seniority in terms of years and even some type of expertise but have not obtained the certification could be superseded by those who have may have less years of seniority.

In those cases, this would not be considered subverting the seniority system and Management would be in its rights to appoint the most qualified bidder. Especially if all of the employees have the opportunity to obtain this certification. Such opportunities exist at this mine with its educational reimbursement programs.

As it pertains to the combining of positions and/or multiple titles, Arbitrators have held that Management may normally proceed to do so in the interest of maintaining its competitive position and promoting efficiency. UMA & Wolf Creek Collieries Company, Case NO. W.C.-95-17-11, pg. 27 (1995) Michael L. Allen Arbitrator. Management in this case states that by having the Master Welder on staff, this would eliminate the need to contract welding work out and improve internal efficiency.

However that same decision acknowledges that where the combined classifications have been so wholly unrelated to each other this could constitute an unreasonable subversion of the classification and seniority system. (Ibid., pg. 28) This could also be viewed as a violation of Article XIX, which states "An Employee shall normally be assigned to duties customarily involved with his regularly classified job . . .

In the Wolf case, Arbitrator Allen determined that the combination of the fire bossing certification requirement into the plumber/electrician position, served as a logical and efficient means of accomplishing the valid objective of fire bossing remote pumps that are located throughout the mine.

In the case before me, Management did not present any rationale for combining of the different classifications other than the cost savings of doing these jobs in house and that Management had already been assigning Mr. Phillips these duties and that he had been doing them for a period of time.

Management also stated that in order to justify keeping him on the surface in a full time position, this position had to be supplemented by utilizing his Welding skills. In other words there was not enough independent work for either job.

While the Wage Agreement does not prohibit combining jobs, and the actual assigning of job duties and the setting of reasonable standards' rest with Management, this should be done pursuant to the terms of the collective bargaining agreement. Therefore in the absence of any mutual agreement, the Company cannot unilaterally combine unrelated duties and classifications and create new hybrid positions.

Finally the Union requests that Management be Ordered by the Arbitrator to post the position of Surface Utility Man, which are the duties the Union contends that Mr. Phillips is performing. They also state that this posting was agreed to by Management in order to resolve complaints from Senior employees who wanted to bid on that position.

The difficulty in ordering Management to post a position is encompassed in Article IA(d), which outlines Management rights. UMA & Jim Walter Resources, Case No. 99-76 (2000) discusses the standards by which to conclude that a job exists. In that Decision Arbitrator Sergeant discusses ARB Decision 78-26. In that decision, the ARB commented on the quantum of proof needed to justify the conclusion that a job exists to a sufficient extent to require that it be perpetuated.

ARB Decision 78-26 states:

. . .if the evidence clearly establishes the fact that the Employer has created a full-time job . . . then a remedy ordering posting of the job for bidding is appropriate. ARB Decision 78-26, pg. 17

However, as ARB Decision 78-26 further states:

. . . to order the creation of a vacancy or a job, on a finding that one cannot tell from the evidence that a job has been created ore exists, is an invasion of the reserved Management prerogative and is beyond any authorization found in the Agreement. Such a remedy invades the clearly-reserved exclusive discretion of the Employer to determine whether, if, and when a job or vacancy occurs and is to be posted for bidding. (Decision, pg. 11)

According to the testimony of Management, Mr. Phillips performs duties other than welding fifty(50%) percent of the time. According to the testimony of the Union he performs those duties 60% of the time. Therefore there is insufficient evidence to determine whether the position Mr. Phillips is occupying is a full time Surface Utility Man position.

The position that he currently occupies is the new position of Master Welder/Mechanic. However it has already been determined that this position cannot exist under the terms of the contract.

Based on the decision in this matter concerning the Master Welder/Mechanic position, Management must now determine, in accordance with the process outlined in the collective bargaining agreement what position Mr. Phillips will occupy and the Union, it is hoped, will be involved in that process. However, the Arbitrator cannot order the posting of any position in this case.

Based on all of the above, the Arbitrator determines that Management improperly posted a position of Master-Welder at the Emery Mines. This position is a new position as defined by the Wage Agreement and can only be established through Section XVI(h) of the Wage Agreement.

Therefore the grievance is sustained in part and denied in part.

VII.
AWARD

Management is hereby Ordered to rescind the Posting of Master Welder/Mechanic that is the subject of the Union's 11-05-23-06 grievance. No other award is made.

Dated:

FRED D. BUTLER, Arbitrator